

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

Telecommunications Relay Services and
Speech-to-Speech Services for Individuals
with Hearing and Speech Disabilities

CG Docket No. 03-123

COMMENTS OF SNAP TELECOMMUNICATIONS, INC.

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SUMMARY

In November 2007, the Commission adopted a tiered rate methodology for video relay service (“VRS”) that provided stable and predictable compensation rates for VRS providers for a three-year period.¹ The Commission established three specific rate tiers to reflect cost differentials between small providers and new entrants, mid-level providers who are established but who do not hold a dominant market share, and large, dominant providers who are in the best position to achieve scale and scope economies and efficiencies. Snap Telecommunications, Inc. (“Snap” or “Snap!VRS”), all other VRS providers, the deaf and hard of hearing community, and all Commissioners in a unanimous ruling based on a comprehensive record developed over 16 months, supported this VRS Rate Order. Snap and others have substantially relied on this Order in making significant financial and operations decisions.

On May 14, 2009, however -- less than 18 months after this sound and reasoned ruling --, the Commission released an NPRM seeking comment on whether it should upend the current rate methodology by dramatically cutting the VRS tiered rates.² Snap strongly opposes this proposal, as it would significantly harm Snap and other VRS providers that have relied on the stability and predictability of the three-year rate plan, and consequently also adversely impact consumers of relay services. In its Comments below, Snap makes the following points:

- The current VRS rate methodology has substantially benefited consumers. Snap provides specific examples of initiatives it has spearheaded in the videophone, workplace, and interpreter areas which highlight the significant benefits that have resulted for the relay community largely as a result of the fair, stable, and predictable tiered rate methodology.
- Modification to the current VRS tier rates based on the weighted average actual costs of VRS providers cited in the NPRM would significantly harm relay consumers and potentially bankrupt many VRS providers. Notably, Snap discloses herein previously confidential data

¹ See *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order and Declaratory Ruling, 22 FCC Rcd 20140 (2007), as corrected by Erratum, DA 07-5089, 22 FCC Rcd 21842 (2007) (“2007 Rate Order”).

² See *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Notice of Proposed Rulemaking, FCC 09-39 (rel. May 14, 2009) (“NPRM”).

indicating that its actual VRS costs per minute as submitted to NECA for 2007 and 2008 were \$17.83 and \$11.32, respectively -- which is *several times higher* than the weighted average costs for all providers cited in the NPRM (*i.e.*, around \$4.00). As this and other data Snap provides clearly show, not only are the current VRS tier rates *not* excessive, but in the case of Snap and other VRS providers, they are *much lower* than the actual costs reported to NECA by numerous VRS providers.

- Contrary to the Commission's claim, the historical weighted average cost per minute data cited in the NPRM is in no way *new* information that could justify a dramatic reduction in VRS rates. Rather, these costs were clearly known to each of the Commissioners who voted 5-0 in favor of the current VRS rate methodology. Moreover, the historical costs submitted by providers and reported by NECA in its 2009 report have not changed substantially over the last three years, and, in fact, *increased* from 2007 to 2008. These data further support leaving the current VRS rate methodology intact.
- Some key marketplace changes since 2007 -- which the NPRM neglects to mention -- such as the Commission's imposition of new obligations on all VRS providers to implement 10-digit numbering and enhanced 911 systems, further undermine any argument that now is a sensible time to consider dramatic reductions in the VRS rates. Indeed, when previously faced with a similar set of circumstances back in 2005 (when the interoperability and speed-of-answer rules were in flux), the Commission rightly came to precisely the *opposite* conclusion.
- Snap suggests several practical recommendations for the Commission to protect the integrity of the Fund without causing the consumer harms associated with undoing the current VRS rate methodology. Notably, the Commission should: (1) bring enforcement actions against providers engaging in illicit activities to manufacture improper VRS minutes; (2) gather and assess a broader range of data (such as annual VRS user growth and various measures of service quality) before suggesting changes to the compensation rates; and (3) focus its consideration of any future changes to the VRS rates on the top tier, to account for the economies of scale enjoyed by the largest VRS providers, but should not do so in such a drastic way that it discourages smaller providers from growing and competing against the largest providers.
- The Commission's Initial Regulatory Flexibility Certification appended to the NPRM violates the Regulatory Flexibility Act, because it asserts, contrary to the facts above, that the NPRM's proposed changes will not impose a financial burden on small businesses. In order to address this defect, at the very least the Commission would have to reissue the NPRM with an Initial Regulatory Flexibility Act analysis that, among other things, presents a reasonable explanation of significant alternatives to the proposed rule which minimize the rule's adverse economic impact on small businesses like Snap.

Accordingly, Snap respectfully urges the Commission to maintain the current VRS rate methodology and adjust the rates as set out by NECA in its report and proposal for 2009-10 and in the Commission's *Public Notice* accompanying the NPRM -- *i.e.*, Tier 1 rate of \$6.7025, Tier 2 rate of \$6.4352, and Tier 3 rate of \$6.2372.

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Snap Telecommunications, Inc. (“Snap” or “Snap!VRS”), by its attorneys, hereby files its Comments on the Notice of Proposed Rulemaking (“NPRM”) in the above captioned proceeding. Snap has also created an ASL video encapsulating these Comments; this video is accessible on Snap’s web site at http://www.snapvrs.com/about_us/press/article/?id=25.

I. THE CURRENT VRS RATE METHODOLOGY HAS SIGNIFICANTLY BENEFITED CONSUMERS.

A. The Current VRS Rate Methodology Was Central to Sustaining Snap’s Viability.

In establishing its three-year rate approach for VRS, the Commission pledged that it would “avoid having to possibly adjust on a short notice to a lower rate,” noting that the establishment of a stable and predictable three-year rate plan would support providers’ “planning and budgeting.”³ The Commission’s unanimous 2007 rate decision was reasonable and justifiable.

In Snap’s case, the current VRS rate methodology actually served as a key part of its survival. As a small startup that has only been in business for two years, Snap has faced significant hurdles

³ 2007 Rate Order ¶ 56.

and expenses in its efforts to bring a new level of innovation and service quality beneficial to the deaf and hard of hearing community, as well as to hearing people who use relay services. Snap was on the brink of closing its doors back in 2007, as potential investors were wary of loaning Snap additional funds to build out its network given the uncertainties surrounding the VRS rate reimbursement regime. By affording VRS providers a reasonable level of reimbursement, as well as the certainty and predictability necessary to support their business plans, the current three-year VRS rate methodology made it possible for Snap to secure new capital investment that has financed some key initiatives which have significantly increased the accessibility of telecommunications to relay consumers. Below Snap describes a few specific examples of pro-consumer initiatives that it has spearheaded over the last two years -- initiatives that would have been impossible to launch and/or sustain without the current VRS rate methodology.

B. Snap's Significant Innovation in VRS Consumer Equipment.

Due to the predictable compensation rates established in the *2007 Rate Order*, Snap was able to secure financing for its continued investment in the purchase and distribution of the innovative Ojo videophone and accompanying network upgrades. The Ojo, which was the first breakthrough videophone alternative to Sorenson's devices, has significantly enhanced videophone quality and functionality for VRS consumers. The Ojo was also the first interoperable videophone to use Session Initiation Protocol ("SIP"), which provides a more efficient, simplified architecture than the legacy H.323 protocol. SIP has been subsequently adopted by all other VRS providers that make videophones available to customers and by Sorenson in its proposed videophone interface standard. SIP has had the effect of dramatically increasing the installation of videophones in places where deaf people congregate, which were formerly inaccessible due to the less secure legacy protocol and its drastically higher bandwidth requirements. SIP was also the technology of choice in significant

efforts by various industry players to establish E-911 solutions for VoIP and VRS.⁴ Had it not been able to rely on the fair and stable three-year rate plan established by the Commission, Snap would not have been able to sustain its investment in and dedication to this groundbreaking innovation, which has greatly benefited VRS consumers and has sparked further competition and innovation by other VRS providers.

C. Snap's Initiative to Serve Deaf Employees in the Workplace.

As New York Governor David A. Patterson commented upon becoming the first blind governor of New York State:

71 percent of the blind are unemployed, 90 percent of deaf people in this country are unemployed. Maybe one of them could figure out a cure for cancer, but we can't get them into the workplace. The educational proficiency of the disabled surpasses the national education average, and yet we have these horrible unemployment rates in those communities.⁵

Snap believes that a significant cause of this problem is that many businesses do not currently have the technology tools that can afford equal opportunities to deaf and hard of hearing individuals. As one deaf advocate has described it:

I want a person who is deaf working in a large company to be able to use a videophone from his or her desk, to call a coworker in another office or his or her spouse or kids at home. ... Many ADA responsible clients truly want to communicate effectively but technology is actually hindering their ability to communicate and to do so most cost effectively. Wouldn't it be great if an employee could use a telephone call to talk to a coworker in another office or Department

⁴ See *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities Petition for Declaratory Ruling on Video Relay Services Service Interoperability*, CG Docket No. 03-123, Comments of Snap Telecommunications, Inc. (filed July 17, 2006) (detailing the many benefits of the SIP protocol for the advancement of the VRS industry).

⁵ See Statement of New York Governor David A. Patterson, Press Conference Remarks, New York Times, Mar. 13, 2008, at <http://cityroom.blogs.nytimes.com/2008/03/13/paterson-we-have-to-get-new-york-back-on-track/?hp>. See also Denise Kavin, Kim Brown Kurz, Deaf Professionals in Education and Social Services: Their Career Mobility Experiences, Presentation at the PEPNet Conference in Columbus, OH (Apr. 2008), at http://www.pen.ntid.rit.edu/newdownloads/conferences/attended/2008/PEPNet_Ohio/Presentation_DeafProfessional.pdf (explaining the many difficulties that deaf professionals face in the workplace, such as discrimination, lack of job mobility, and difficulty in participating in conferences).

through VRS? We are not fearful that it would replace interpreters who come to the site to work meetings and special events but it sure would create a better workplace.⁶

Snap has undertaken significant efforts to help assuage this unacceptable situation.

Specifically, largely as a result of the reasonable and stable VRS rate methodology adopted in the *2007 Rate Order*, Snap launched and is now actively pursuing various ways to bring the benefits of VRS functionality to corporations and institutions throughout America. The Ojo -- with its advanced SIP-based architecture -- has been designed to work within the confines of corporate and other private and public entities' IT infrastructures and to overcome technological hurdles that had previously made it difficult, if not impossible, for deaf and hard of hearing employees to utilize VRS in the workplace (*e.g.*, robust firewalls and encryption systems).

Many of these organizations have diversity initiatives in place and are looking to hire an increasing number of deaf or hard of hearing employees. The Ojo/Snap!VRS combination makes it considerably easier to accomplish that, as it creates a substantially enhanced work environment for those employees. This, of course, is a benefit not only to the deaf community, but to all businesses and the nation as a whole.

D. Snap's Emphasis on Higher Quality, Professional Interpreting.

The current VRS rate methodology has also allowed Snap to selectively hire and maintain high quality video interpreters ("VIs") to serve its customers. Snap's call centers are managed by an experienced interpreter agency -- Interprettek (<http://www.interpretek.com/>) -- with professional qualification requirements for VIs and a serious commitment to providing superior ASL interpreting services. The current rates have allowed Snap to avoid any dilution of the quality of interpreting

⁶ See Comments of Deborah Gunter on Ed's Telecom Alert (Sept. 11, 2008), at <http://www.edsalert.com/2008/10/28/should-features-of-vp-be-passed-on-to-new-default-vrs-provider/> (last visited June 4, 2009). See also Kavin and Kurz, *supra* note 5 (quoting a deaf professional's comments that "[the videophone] has been really great. I feel more independent and can do my work without depending on the staff interpreters. This technology is truly a blessing"); Statements of Paul Singleton, Department of Defense Computer and Electronic Accommodations Program (Dec. 7, 2007) (explaining the many benefits of videophones in the workplace for deaf individuals), at <http://tap.gallaudet.edu/emergency/nov05conference/Remarks/Singleton.asp> (last visited June 4, 2009).

required for consumers of widely diverse backgrounds and needs, and to keep fidelity to the Americans with Disabilities Act and Commission standards in enabling accessible telecommunications.

In addition, in reliance on the rates set for a three-year period, Snap has invested in and launched a virtual video interpreter (“VVI”) project in which a small number of VIs handle VRS calls for Snap remotely out of their homes, rather than in a Snap call center. While call center-based VIs are the core of Snap’s business, VVIs provide many complementary benefits, including making more interpreters available to VRS customers; reducing Snap’s speed of answer, especially during unexpected peak calling; supporting a more efficient and less stressful environment for interpreters; and enabling small providers like Snap to compete more effectively with larger providers for the limited number of interpreter agencies in business. Snap has developed a standardized and controlled work environment for VVIs, so that consumers cannot tell that a VVI is being used as opposed to a VI in a Snap call center.

E. The Deaf Community Has Broadly Embraced Snap’s VRS Innovations and Enhancements.

Deaf and hard of hearing consumers have significantly benefited from the foregoing Snap initiatives, and they have widely praised Snap for introducing them into the marketplace. For example, here is what deaf and hard of hearing individuals have said about these developments:

- “My wife and I have used Snap!VRS and its innovative Ojo videophone for 2 months now. Both of us are VCO users. Here are my comments regarding the Snap!VRS service and its innovative videophone, the Ojo. Comments are based on a guesstimate of perhaps 25-40 calls made over two months:
 1. Ojo is an attractive videophone with a small footprint and an integrated high quality video screen.
 2. Audio for VCO purposes is integrated into Ojo...no need to give VI a voice phone number for a callback.
 3. All interpreters have been found to be highly skilled. Cannot comment on voice reversing skills due to VCO usage.
 4. Ojo is easy to self-install and includes STUN server capabilities that allow transversal of most residential gateways.

5. Integrated video sign mail is a fantastic feature.
 6. Ojo works with virtually any other H.323-based videophone. Ojo-to-Ojo calls can be made using a phone number as opposed to a DNS or IP address.
 7. Snap!VRS wait time for interpreters have all been under 30 seconds. This shows they are adequately staffing to meet increasing demand.
 8. Very importantly, Snap!VRS is giving Sorenson some sorely needed competition thanks to the unique Ojo. Sorenson's VP-200, which I also have, is a very good videophone, and was designed from the "ground up" for Deaf VRS users. We all know how badly innovation and R&D is needed in the VRS market. We can sadly thank the FCC for not allowing vendors to be reimbursed for R&D costs, so there's no incentive for most of the vendors to make the capital investments. I'm thankful to Snap!VRS for being creative and taking the risks to set themselves apart in the increasingly crowded VRS market.
 9. The VP-200 and the Ojo can both cohabitate on the same network, which is untrue for more than one VP-100/200's/Dlink 1000's. This means my wife and I can make simultaneous VRS calls.
 10. Ojo software is relatively intuitive and easy to use.”⁷
- “I have the Ojo, and Sorenson. I MUCH prefer my Ojo to my Sorenson VP. I think it is so much easier to use than the Sorenson, and it's easier because I don't have to make my fiancé turn off his TV every time I get a phone call. I find the set up to be about the same, there's only a few differences between them. And the Ojo is so much nicer quality than VP200.”⁸
 - “The Small screen [of the Ojo] is a GOOD THING in my opinion. I can't tell you how many times on other videophones where people set up the screen/camera so far away that it's impossible to see them. With the Ojo, they're forced to sign clearly and to sit close to the Ojo. Personally, I love it. The phone uses very little bandwidth compared to its main competitor and in my house, we have two Ojo's set up behind one firewall.”⁹
 - “I think Snap!VRS is an amazing service. They are very quick to answer my calls and I never have any problem with clarity between the interpreters and me. Anyone agree?" The following replies were posted: "I do agree, completely! I'm also impressed with the video quality that I have seen on my friends' new Ojos - I can't wait to get mine!;" “The interpreters are really nice and good too. I liked using it with my vp.;" and “wow me too they are quick not long wow smile.”¹⁰

⁷ See Video Relay Review, Snap!VRS, at http://www.vrsreview.com/index.php?option=com_content&task=view&id=13&Itemid=1 (last visited June 4, 2009).

⁸ See Ed's Telecom Alert, Ojo Pro, at <http://www.edsalert.com/2008/07/10/ojo-pro/> (last visited June 4, 2009).

⁹ See AllDeaf.com Forums, at <http://www.alldeaf.com/relay-services/44968-snapvrs-ojo-vp-2.html> (last visited June 4, 2009).

¹⁰ See Snap! VRS, VRS Quality Discussion Board, at <http://affiliate.kickapps.com/service/displayDiscussionThreads.kickAction?w=88075&as=12815&d=18835> (last visited June 4, 2009).

- "I use my Ojo to call Snap!VRS because they have very skilled interpreters and because I LOVE my OJO."¹¹

Unfortunately, as explained below, were the Commission to undo the current VRS rate methodology using some of the unjustified assumptions and artificially low cost figures set out in the NPRM, it would unquestionably greatly diminish or even preclude Snap's capacity to offer the consumer benefits described above.

II. MODIFICATION TO THE CURRENT VRS TIER RATES AS PROPOSED IN THE NPRM WOULD SIGNIFICANTLY HARM DEAF CONSUMERS AND BANKRUPT MANY VRS PROVIDERS, INCLUDING SNAP.

A. Snap's Costs of Providing VRS for 2007 and 2008 Were Several Times Higher than the Weighted Average Costs Cited in the NPRM.

The NPRM asks whether the Commission should revise the VRS rates downward based on the weighted average cost levels set out in the NPRM -- *i.e.*, in the \$4.00 to \$4.56 range.

Unless the Commission's goal is to drive Snap and other VRS providers out of business and deprive relay consumers of the substantial benefits described in the previous section, the answer is a resounding no. As Snap's most recent annual NECA cost filing makes clear, Snap's "actual costs" in 2007 and 2008 generated a cost per reimbursable minute of \$17.83 and \$11.32, respectively¹² -- *several times higher than the average costs the NPRM identifies as the possible level to which VRS rates should be reduced.*¹³ As this data clearly show, not only are the current VRS tier rates *not*

¹¹ See Ed's Telecom Alert, Ojo and WorldGate, at <http://www.edsalert.com/2008/02/12/ojo-and-worldgate/> (last visited June 4, 2009).

¹² The cost per-minute is calculated based on the following key components: The provider's total reimbursable expenses for the year (as explained below, this total excludes a significant amount of expenses, such as certain R&D and videophone-related costs that are not reimbursable under the Commission's rules), divided by its total VRS minutes for the year, + reimbursement for non-CPE-related capital investments (at the Commission's 11.25% rate of return and for the same number of annual VRS minutes), + a per-minute capital allowance (at the Commission's 1.4% rate). Although Snap had sought confidential treatment for this data when submitted to NECA, given the significant risk to Snap's viability if the Commission were to reduce the current VRS rates, as well as the requests by consumer groups to have access to such data, Snap decided to make this data public.

¹³ This discrepancy is largely due to the fact that the NECA "average" cost figures cited in the NPRM are the "weighted average" costs of the providers, which are driven to this level due to the disproportionately large size of the biggest VRS provider in the marketplace (with approximately 80% of the minutes) and the lower costs it is able

excessive, but in the case of Snap and other VRS providers, they are also *lower* than the actual costs reported to NECA by numerous VRS providers.

Moreover, the Commission and others analyzing this situation must acknowledge that the historical costs cited above for Snap and other providers actually *understate* these providers' real-world *actual* costs to provide VRS. As Sorenson's recent petition correctly explains, substantial costs expended by Snap and other providers, such as videophone-related costs (including the significant costs to purchase, upgrade, install, support, and maintain such equipment for deaf or hard of hearing customers) and certain research and development ("R&D") costs are *not* compensable under the FCC's and NECA rules and thus are not even reflected in the above cost figures for Snap and other providers.¹⁴ This fact further highlights the insupportable nature of a suggestion to gut the current VRS rate tiers and replace them with rates based on the weighted average of providers' artificially low NECA-allowed historical costs.

Viewed in light of this additional data, there is simply no basis for the Commission or anyone to claim that the current VRS tier rates are too high as applied to Snap and other similarly situated VRS providers. To the contrary, Snap is working hard to get to the point where even the current VRS tier rates (which NECA's recent filing with the FCC proposes to be \$6.7025 for the first tier,

to achieve due to scale economies. *See 2007 Rate Order* ¶ 52 (deciding to adopt a tiered rate methodology "to more appropriately reflect the financial situation of all providers. Presently there are eleven VRS providers, and these providers are not similarly situated with respect to their market share and their costs of providing service. For several years now, one provider has a dominant market share, and thus this individual provider's projected minutes and costs largely determine the rate. The record reflects, however, that providers with a relatively small number of minutes generally have higher per-minute costs").

¹⁴ *See In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Dkt. No. 03-123, Sorenson Motion to Rescind VRS Rate NPRM or, in the Alternative, to Extend the Comment Period, at 4 (filed May 19, 2009) ("*Sorenson Motion to Rescind*") ("[T]he phrase used in the NPRM to denote NECA-allowed costs -- *i.e.*, 'actual costs' -- is in fact an Orwellian construct, referring not to the true actual costs of providing VRS, but rather to that portion of the costs that a VRS provider incurs to furnish its service that the FCC (and its agent NECA) have deemed to be compensable. This proposal to base rates on the artificially low NECA-allowed costs of providing VRS, if ever adopted, will almost certainly be assailed, and in all likelihood struck down, as 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'").

\$6.4352 for the second tier, and \$6.2372 for the third tier) are sufficient to compensate it for its significant cost expenditures in fulfilling statutory and regulatory mandates in serving consumers.

Were the Commission to proceed with adoption of its proposal notwithstanding the clear real-world facts at issue, the results would be devastating for numerous VRS providers and for relay consumers. At the very least, several providers, including Snap, would likely be driven out of business because they would not be able to recover their costs or even contemplate a plan for doing so over time.¹⁵ Gone with them would be much of the innovation, improved videophone technology, increased competition, enhanced service quality, and new workplace and public access opportunities for the deaf described above. Left in their wake would be a more entrenched monopoly VRS provider facing far *less* competition than before, a result that would be squarely at odds with what is called for by key congressional and Commission policy objectives mandating *greater* competition and *greater* innovation in the TRS/VRS marketplace.¹⁶

¹⁵ See *id.* at 9-10 (“[I]t borders on recklessness for the Commission to race ahead with proposals that may slash VRS rates without considering whether doing so would -- as Sorenson fears -- bankrupt most, if not all, VRS providers; curtail the availability of VRS to the deaf; and force any surviving providers to reduce their labor costs by laying off video interpreters and deaf employees.”). Even though Snap’s historical costs have been far above the per-minute compensation rates under the current VRS rate methodology, Snap nonetheless believes that these current rates are reasonably set and that, under its current business plans, Snap should be able to bring its cost per minute down so that these current rates will eventually compensate Snap for its VRS cost expenditures. However, this belief and expectation is only possible if the rates remain fair, stable, and predictable going forward. If, by contrast, the Commission were to pull the rug out from under Snap and others in the industry by changing the rules mid-way and reducing the tier rate levels, that would likely put a halt to Snap’s business.

¹⁶ See *e.g.*, H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. at 78 (1990) (noting the ADA Committee’s intent that “telecommunications relay services be governed by minimum federal standards that will ensure that telephone service for hearing and speech impaired individuals is functionally equivalent to telephone services offered to hearing individuals. Such standards, however, should not have the effect of freezing technology or thwarting the introduction of a superior or more efficient technology.... The hearing- and speech-impaired communities should be allowed to benefit from advancing technology. As such, the provisions of this section do not seek to entrench current technology but rather to allow for new, more advanced, and more efficient technology”); *In the Matter of Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 98-67, Declaratory Ruling and Second FNPRM, Separate Statement of Commissioner Michael J. Copps, 17 FCC Rcd 7779, at ¶ 9 (2002) (“As new technologies develop, we have an obligation to do everything we can to realize the vision of Congress that those with disabilities have access to *functionally equivalent* services so that *all* citizens can participate fully in our society.”) (emphasis added); *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Report and Order and Order on Reconsideration, 20 FCC Rcd 20577, at ¶ 26 (2005) (noting in its order approving a federal VRS certification process that “the addition of new providers will not only enhance competition, but advance technological development, increase quality of service, and reduce

B. Changes Since the Commission's 2007 Rate Decision Do *Not* Support Lowering the VRS Rates.

The Commission suggests in the NPRM that a reduction of the current VRS rates is needed because “[t]he Commission now has the benefit of experience with the two VRS rate cycles” since adoption of the *2007 Rate Order* which indicates that the established rates may be higher than the NECA-allowed costs of providing VRS.¹⁷ As shown above, however, this logic is decidedly flawed with respect to Snap and many other VRS providers whose “actual” costs are in fact *higher* than even the current VRS tier rates.

But even if one focuses just on the facts set out in the NPRM itself, the Commission's logic and proposal cannot stand. The historical weighted average cost per minute data cited in the NPRM is in no way *new* information that could justify a dramatic reduction in VRS rates. Rather, this level of costs was clearly known to each of the Commissioners who voted 5-0 in favor of the current VRS rate methodology during their deliberations over this methodology. Specifically, NECA's May 1, 2007 annual report on which the Commission based its three-tier VRS rates clearly indicated that the actual weighted average cost per minute reported by the VRS providers for 2006 was \$4.5568.¹⁸ This \$4.5568 figure is the very same one cited in the NPRM for 2006. Moreover, the historical cost information submitted by providers and reported by NECA in its 2009 report have not changed substantially over the last three years, and, in fact, *increased* from 2007 to 2008 (*i.e.*, \$4.5568 in 2006, \$3.9950 in 2007, and \$4.1393 in 2008).¹⁹ The *upward* trend line of these weighted average

costs. In this way, we further fulfill two statutory mandates under Section 225: ensuring that TRS is available ‘to the extent possible and in the most efficient manner’ to persons with hearing and speech disabilities ... and ‘encourag[ing] ... the use of existing technology and ... not discourage[ing] or impair[ing] the development of improved technology’”).

¹⁷ NPRM at ¶ 11.

¹⁸ See *In re Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act*, CG Docket No. 03-123, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, at 19 and Exhibit 1-4b (filed May 1, 2007).

¹⁹ See NPRM ¶ 11.

costs, particularly when considered in light of the *downward* trend line of the current VRS tier rates as proposed in NECA's May 1, 2009 report, underscores the fact that the current VRS rates are set at a reasonable level and, if anything, may be *too low*.²⁰

Two other changes cited by the NPRM are that the size of the TRS Fund continues to grow and that VRS represents an increasingly large percentage of the total Fund size. But neither of these facts justifies any change to the VRS tier rates, let alone a dramatic reduction in them. The fact that VRS minutes are increasing is actually a *positive* development, as it shows that more users are recognizing that VRS provides many benefits over traditional TRS. As evidence of this shift from traditional TRS to VRS, consider the following:

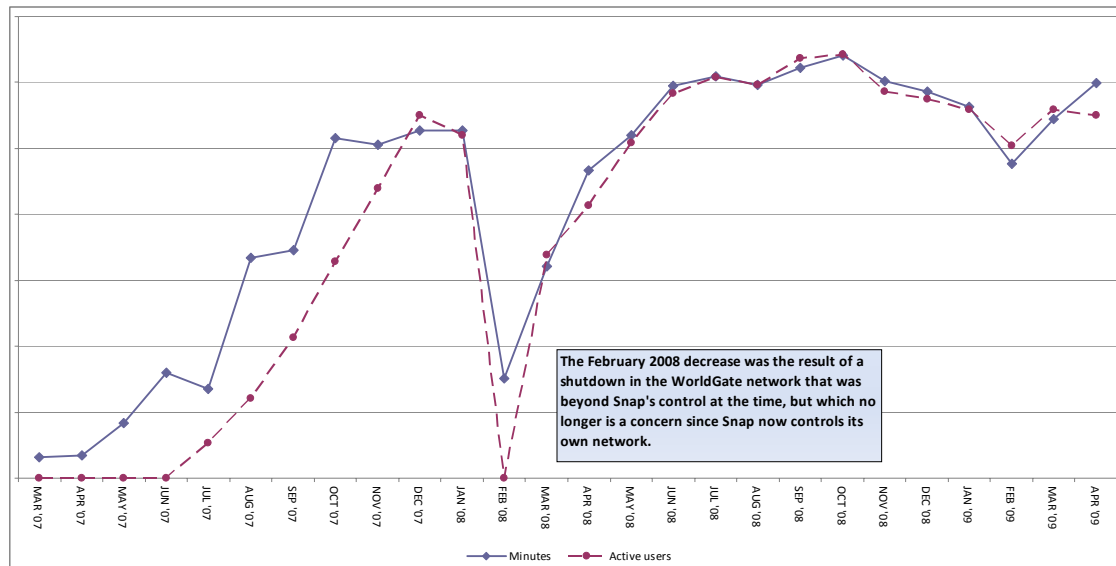
In 2002, the total number of traditional TRS minutes was 30,332,278, while the total number of VRS minutes was only 530,053.²¹ By comparison, for 2008, the total number of TRS minutes had decreased to 10,956,418, while the total number of VRS minutes increased to 88,064,970.²² These data show that the dramatic increase in VRS minutes is largely due to traditional TRS customers switching to VRS.

²⁰ Additionally, as Sorenson explained in its recent *Motion to Rescind*, during the last two rate cycles the Commission adopted a VRS rate significantly higher than NECA-allowed costs, and the Commission "has long known that the NECA-allowed costs, even adjusted for inflation, are lower than the tiered VRS rates." *Sorenson Motion to Rescind* at 5. This is because the Commission has soundly chosen to reward efficient VRS providers by allowing them to retain the savings generated by providing VRS at a lower cost than its competitors. It does this by compensating providers based on the average of all providers' projected costs and regardless of an individual provider's actual costs in providing VRS. This methodology gives providers a real incentive to innovate and reduce costs. As shown above, this approach has been very successful in *increasing* innovation and competition (and, incidentally, also in *reducing* VRS rates over time -- from \$17+ in 2002, to nearly \$9 in 2004, to less than \$6.70 today) -- , which has significantly benefited relay consumers. If the Commission were now to move to a VRS reimbursement scheme based on providers' actual costs, it would nullify the efficiency-, competition-, and innovation-enhancing effects of the current rate methodology. The result, as noted, would be harm to consumers, as providers like Snap would no longer have the ability or the incentive to continue to invest in order to innovate and compete, and so this would simply further entrench the monopoly provider and unwind the pro-consumer developments in videophones, enhanced quality, better interpreting, etc. that have brought the VRS service to where it is today.

²¹ See *In re Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act*, CG Docket No. 03-123, Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, at Exhibits 3-2 and 3-7 (filed by NECA May 1, 2009).

²² See *id.*

Snap's own data corroborate and extend this conclusion. As the chart below illustrates, Snap's increased provision of VRS minutes over the last two years (solid line) has been closely linked to an increase in the number of active Snap users over this same period of time (dashed line).²³



Since VRS affords deaf and hard of hearing consumers with a way to communicate via ASL, their first language, the dramatic adoption of VRS by such individuals -- as reflected in the NPRM's reference to the increased percentage of the TRS Fund representing VRS minutes -- is something that should be *applauded* by the Commission and others, not cited as a basis to undo the pro-consumer VRS offerings that the Commission's sensible rules to date have commendably helped to foster.

Finally, the NPRM neglects to mention other significant changes that have taken place since adoption of the 2007 VRS rates, notably, the imposition of new obligations on all VRS providers to implement 10-digit numbering and enhanced 911 systems. Snap is working diligently to comply with these requirements, which are both complex and costly to implement. At the same time, the Commission has said that some of these new costs -- *e.g.*, those associated with (1) acquiring 10-digit

²³ Active users are those users placing calls with a Snap-provided Ojo. The chart shows zero active users for March-June 2007, because while Snap began operations in March 2007, it did not start shipping Ojos until July 2007. The minutes of use shown in the chart for these first four months, as well as for the period in February 2008 when the Ojo network was down, are from Internet dialing (*i.e.*, "dial-arounds") which still occurs today for a small percentage of Snap's minutes.

numbers (local or toll free) for distribution to deaf or hard of hearing customers, (2) porting 10-digit numbers, and (3) E-911 charges imposed by a state or local E-911 funding mechanism -- are not eligible for reimbursement from the Interstate TRS Fund. While the Commission decided to separately reimburse as exogenous costs certain other costs directly related to 10-digit numbering and E-911, none of these costs have yet to be reimbursed by NECA. Moreover, NECA recently accelerated the deadlines by which providers must submit their monthly minutes reports, but simultaneously extended the amount of time before reimbursement for such minutes will occur.²⁴ The imposition of these major new regulatory burdens and costs on VRS providers, particularly when coupled with such delayed reimbursement, has placed even greater financial strains on Snap and other VRS providers, thereby further undermining any argument that now is a sensible time to consider dramatic reductions in the VRS rates. Indeed, when previously faced with a similar set of circumstances back in 2005, the Commission rightly came to precisely the *opposite* conclusion:

We conclude that the median rate is the most appropriate rate for the 2005-2006 Fund year. This rate is closest to a majority of the providers' proposed rates and is a better indicator of reasonable costs in this unique situation, where there are several pending issues under consideration impacting providers' costs. As we have noted, the Commission's rules mandate that providers be compensated for the "reasonable" costs of providing service. The record reflects that the "reasonableness" of costs will vary depending on the level of service provided. Because of open quality of service issues such as speed of answer and interoperability, the record reflects that the providers may not be offering consumers the same level of service. In these circumstances, where NECA's proposed rate was calculated at a time when certain key VRS rules are in flux, and where services are being provided at various levels of service quality, we believe that an alternative compensation rate is appropriate. We are concerned that both the overall quality and availability of the service may suffer under NECA's proposed rate.... We conclude that the median rate of \$6.644 per minute represents a just and reasonable rate for compensating providers of VRS. That rate is closest to a majority of the providers' proposed rates, and will result (by

²⁴ See NECA Letter to all Interstate TRS Providers, May 14, 2009 (requiring, among other things, that submission of VRS providers' Monthly Minute Report for July 2009 will be due by August 14, 2009, yet disbursements for July 2009 minutes will not be made until September 22, 2009, and that subsequent months will be handled the same way, thereby delaying the monthly reimbursements for VRS providers by a month longer than under NECA's prior reimbursement process).

definition) in the same number of providers having costs above the rate as below the rate.²⁵

In short, any effort by the Commission to reduce the current VRS rates, particularly during this period of intense regulatory change and new burdens on providers, would be as inconsistent with Commission precedent as it is with the current financial realities faced by Snap and other VRS providers as described above.²⁶ In the *2007 Rate Order*, the Commission concluded that the \$6.77 Tier 1 rate “fairly reflects *the actual reasonable costs* of the newer or smaller providers offering VRS in compliance with all non-waived mandatory minimum standards.”²⁷ As the foregoing facts demonstrate, that statement is as true today as it was when the Commission approved it in 2007.

III. SNAP’S PRACTICAL RECOMMENDATIONS FOR THE COMMISSION GOING FORWARD.

The facts, precedent, and potential consumer harms discussed above clearly support retention of the current VRS rate methodology and adjustment of the VRS tier rates as set out by NECA in its report and proposal for 2009-10 and in the Commission’s *Public Notice* accompanying the NPRM. At the same time, Snap does not mean to suggest that there are no issues with the VRS minutes or that the Commission is incorrect to pursue efforts designed to protect the integrity of the TRS Fund. However, there are better ways to achieve this worthy goal. Below Snap suggests several such practical recommendations that are more targeted and defensible than the Commission’s proposed upending of the current VRS rate methodology.

²⁵ *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Order, 20 FCC Rcd 12237 ¶¶ 27-28 (2005).

²⁶ *See, e.g., FCC v Fox TV Stations, Inc.*, 2009 U.S. LEXIS 3297, *23-24 (2009) (holding that an agency must provide a detailed justification for an abrupt policy shift when the “new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account”).

²⁷ *2007 Rate Order* ¶ 69 (emphasis added).

A. The Commission Should More Aggressively Pursue Enforcement Actions Against Providers Engaging in Illicit Activities to Increase their VRS Minutes.

Snap recognizes that certain VRS practices currently being engaged in by a few providers are questionable and has consistently urged the Commission to focus greater efforts on clarifying whether these practices are legitimate, and, if not, bringing swift enforcement action against providers who are found to be in violation of Commission rules. While the vast majority of VRS minutes are validly generated, there are notable examples in the record of providers engaging in questionable activities apparently to inflate their minutes and receive extra compensation. For example, last fall the National Association for State Relay Administration (“NASRA”) filed a letter asking the Commission to evaluate and provide clarification on the legality of several VRS providers’ marketing tactics that seemed to conflict with Commission rules.²⁸ The Commission has yet to respond to this letter, even though it was filed over seven months ago and a number of providers, including Snap, have urged the Commission to take action.²⁹ If the Commission were to take aggressive enforcement action against these types of activities, this would likely do much more to increase the efficiency of service under established rates and promote greater coverage of underserved consumers such as those who are deaf-blind or with limited English proficiency than any rate adjustment as a result of the Commission’s NPRM.³⁰ The Commission would be more

²⁸ See *In re Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123, Ex parte Comments of the National Association for State Relay Administration (filed Nov. 10, 2008).

²⁹ See, e.g., Letter from Jeff Rosen, General Counsel and VP of Governmental Affairs, Snap Telecommunications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 03-123 (filed May 15, 2009) (asking the FCC to respond to NASRA’s request); Letter from Regina M. Keeney, Lawler Metzger, Milkman, & Kenney, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 03-123 (filed May 12, 2009); Letter from Ruth Milkman, Lawler Metzger, Milkman, & Keeney, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Docket No. 03-123 (filed Nov. 25, 2008).

³⁰ See, e.g., Letter from Ed Bosson to Chairman Copps, Federal Communications Commission, CG Docket No. 03-123 (filed May 28, 2009) (“[I]t is a mistake to attribute the elevated fund expense solely to the ‘high’ reimbursement rates. I believe the historical elevated growth of the reimbursement expenditure to VRS providers is primarily due to unethical and illegal practices of quite a few VRS providers (both FCC certified and non-certified). ... These actions by providers have created barriers for its intended customers and should be viewed harshly and punishable by the FCC. The eyes of the VRS user community are looking to the FCC Enforcement Bureau to take

assured as to the integrity of the Fund, yet it would avoid causing the significant harms to consumers and providers noted above.

B. The Commission Should Gather and Assess a Broader Range of Data Before Suggesting any Changes to the Compensation Rates.

After the current three-year period ends for the three-tier VRS rates in June 2010, the Commission of course will consider how these rates should be adjusted, if at all, going forward. As part of that consideration, however, the Commission should expand the data it gathers and assesses, so that it can present a fuller picture of the state of the VRS industry, including the benefits being provided to consumers.

For example, Snap has previously joined other VRS providers in urging the Commission to measure the annual change in VRS penetration as a way to show that VRS is serving more deaf and hard of hearing individuals.³¹ While prior suggested metrics for this calculation focused on the number of videophones installed or each provider's total VRS minutes and active users, once the 10-digit numbering regime has been fully implemented and all VRS users are registered and part of a central database, it will be much easier to accurately calculate this penetration figure.³²

action as it should. I strongly believe that when FCC clamps down and disallows these 'manufactured minutes', the total number of VRS minutes (and the TRS Fund expense for VRS) will be reduced significantly. This will provide for a more realistic annual total minutes estimate for projecting the Fund expenditure and the tiered VRS per minute rates. I also believe a good number of the certified and non-certified VRS providers would cease operations because they depend on manufactured minutes to continue. ... Some critics have targeted a solution by focusing on the high rates paid to VRS providers. *I do not think reducing the rates alone will minimize the illegal and unethical VRS calls; if anything, by lowering reimbursement rates, these VRS calls in all likelihood will increase substantially because VRS providers will need more of these illegal and unethical calls to compensate for the loss of revenue. If VRS rates were reduced drastically, say down to break-even cost points; this may inadvertently stifle competition as companies with the largest call volumes will survive these economies of scale better than start ups companies.*") (emphasis added).

³¹ See Letter from Snap Telecommunications, Inc., Sorenson Communications, Inc., and Sprint Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission, CG Dkt. No. 03-123 (filed June 27, 2007).

³² It is useful to note that in June 2007, Tom Chandler, Chief of the Disabilities Rights Office, circulated a memorandum noting that one of the steps that would be necessary to change the rate methodology would be to "collect additional information about the number of deaf and hard of hearing people in the United States and their utilization of the various TRS services. Presently, there is a lack of such information, which prevents the Commission from specifically assessing the program operations and from setting appropriate objectives for the program. It would be beneficial for the Commission -- on its own or through a contract process -- to conduct a study

Moreover, the Commission could compile information from a variety of sources that would indicate trends in VRS service quality, including (1) providers' overall service quality (*e.g.*, calculate for the immediately preceding calendar year the number of FCC complaints filed against VRS providers as a percentage of the total number of VRS minutes and compare that ratio with the ratios in prior years); (2) providers' improvement (or decline) in average speed-of-answer over the past year; and (3) service innovations or improvements deployed in the immediately preceding calendar year (*e.g.*, 10-digit dialing, implementation of E-911 solutions, or other previously waived requirements).

Gathering and assessing such a broader range of data is necessary to ensure that the Commission's review and rate proposals are rooted in a more accurate and complete understanding of this developing marketplace, and not based simply on the increasing size of the TRS/VRS Fund.

C. Considerations for Possible Future Adjustments to the VRS Rates.

If the Commission decides to modify the tiered methodology for the next rate cycle beginning in July 2010, the Commission should focus its consideration on the top tier to account for the economies of scale enjoyed by the largest VRS provider. However, if the Commission modifies the third tier or even creates a fourth tier, the Commission should not do so in such a drastic way that it discourages smaller providers from growing and creating increased competition in the marketplace. Thus, for example, the spacing between the rates of the various tiers should not be significant, lest this prove to be a disincentive to VRS providers from seeking to grow and compete with the largest providers because crossing the minutes threshold from the penultimate to the top tier would result in a plummeting of their reimbursement rate.

to determine these numbers (*e.g.*, how many ASL users there are in the country and what percentage use VRS).” *See Deception and Distrust: The Federal Communications Commission Under Chairman Kevin J. Martin*, Majority Staff Report of the Committee on Energy and Commerce, U.S. House of Representatives, Dec. 2008, at Exhibit 3, p. 5, at http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc_majority_staff_report_081209.pdf.

Finally, Snap has consistently asked the Commission to engage in open dialogue among all the interested VRS stakeholders -- notably consumer groups and providers -- before issuing a mandate that would seriously impact the VRS industry. This open dialogue, which should be regularly occurring even outside of the formal rulemaking process, would: (1) keep the Commission apprised of industry developments and vice versa; (2) promote the reasonable expansion of pro-consumer VRS offerings while nipping in the bud any illicit provider activity; (3) avoid the eruption of “surprise” issues or imposition of uninformed regulatory mandates that could have a significant negative impact on providers and consumers alike; and (4) ensure that all interested parties, including consumer groups which often do not have access to relevant information, are well informed so they can responsibly contribute to industry activities and to proposed regulatory decisions as they arise.

IV. REGULATORY FLEXIBILITY ACT COMMENTS.

The Commission’s Initial Regulatory Flexibility Certification appended to the NPRM violates the Regulatory Flexibility Act (“RFA”). Among other things, the RFA requires agencies to consider the impact of their rules on “small businesses.”³³ When the proposed regulation will impose a significant economic impact on a substantial number of small entities, the agency must evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities.³⁴ While an “Initial Regulatory Flexibility Act” analysis (“IRFA”) is typically required and undertaken as part of Commission NPRMs, an IRFA is not required where the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of

³³ “Small business” under the RFA includes any firm that is “independently owned and operated” and is “not dominant in its field of operation.” 15 U.S.C. § 632.

³⁴ See 5 U.S.C. § 605(b). See also “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,” at www.sba.gov/advo/laws/rfaguide.pdf, at 3 (“RFA Compliance Guide”).

small entities.”³⁵ Here, the Commission chose this latter route. The problem is that its certification is wholly inadequate under the law. The Commission states the following in the certification:

The changes the Commission proposes are of an administrative nature, and for the reasons stated below will not have a substantial economic impact on small entities. The Commission concludes that the proposed changes will not impose a financial burden on entities, including small businesses, because these entities will continue to be promptly reimbursed from the Interstate TRS Fund at a fair and reasonable rate. If there is an economic impact on small entities as a result of these proposals, however, we expect the impact will be reasonably fair and justified, because consistent with the Commission’s rules, rates that reflect actual costs will end excessive profits or surplus payments. The Commission therefore certifies, pursuant to the RFA, that the proposals in this *NPRM*, if adopted, will not have a significant economic impact on a substantial number of small entities.³⁶

However, as Snap has explained in its Comments above, modification of the current VRS rate methodology as proposed by the NPRM would have *severely negative* economic impacts on small VRS providers, many of whom were only able to enter the VRS marketplace, or to sustain their financial viability, due to the fairness, stability, and predictability provided by the current three-year rate plan. Most, if not all, of these providers, including Snap, have based both their short and long-term business plans on these rates and would be devastated -- and in many cases bankrupted -- by a change in the rules as proposed in the NPRM. Thus, the Commission’s statements above that the proposed changes are merely “of an administrative nature” and “will not have a substantial economic impact on small entities” are simply not accurate. The statement that there will be no financial burden on small entities because they will “continue to be promptly reimbursed from the Interstate TRS Fund at a fair and reasonable rate” is equally incorrect with respect to Snap and other small VRS providers, given the specific cost data Snap presents above. And the suggestion that Snap and these other providers are receiving “excessive profits” or “surplus payments” under the current VRS tiered rates further belies reality.

³⁵ 5 U.S.C. § 605(b).

³⁶ NPRM, Appendix: Initial Regulatory Flexibility Certification, at ¶¶ 4-5.

In short, the Commission's Initial Regulatory Flexibility Certification violates the RFA and renders the NPRM defective for that reason as well. It also violates the clear guidelines of the Small Business Administration.³⁷ In order to address this defect, at the very least the Commission would have to reissue the NPRM with an *IRFA* that meets the requirements of the RFA. Such IRFA must include a description of the small VRS providers to which the NPRM's proposed rule would apply and a reasonable explanation of significant alternatives to the proposed rule that minimize the rule's adverse economic impact on such small businesses while accomplishing the Commission's objectives.

V. CONCLUSION

Based on the foregoing, Snap respectfully urges the Commission to maintain the current VRS rate structure until its end in June 2010 and approve the VRS rates proposed by NECA for the 2009-10 period as set forth in the *Public Notice*.

Respectfully submitted,

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³⁷ See *RFA Compliance Guide* at 11 (“[C]ertifications that simply state that the agency has found that the proposed or final rule will not have a significant economic impact on a substantial number of small entities are not sufficient under section 605(b).”).